

ISSUE DATE: December 18, 1996

DOCKET NO. P-442/NA-96-211

ORDER GRANTING RECONSIDERATION AND CLARIFICATION OF PREVIOUS
ORDER

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs
Marshall Johnson
Dee Knaak
Mac McCollar
Don Storm

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of AT&T
Communications of the Midwest, Inc. for a
Certificate of Authority to Provide Local
Exchange Service

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PROCEDURAL HISTORY

On July 15, 1996, the Commission issued its ORDER GRANTING CERTIFICATE OF AUTHORITY WITH CONDITIONS. In that Order the Commission granted AT&T Communications of the Midwest, Inc. (AT&T) a certificate of authority to provide local exchange service in the State of Minnesota, subject to the following conditions:

- AT&T must obtain prior Commission approval of the Company's filed tariffs
- AT&T must obtain prior Commission approval of the Company's interconnection arrangements
- AT&T must include in its tariff a list of all areas (by municipality) where AT&T actually provides service, with that list to be updated as AT&T expands its service territory
- AT&T's authority, service offerings, and terms and conditions of service will be subject to the Commission's local competition rules being developed in rulemaking Docket No. P-999/R-95-53
- AT&T must proceed toward implementation of local service through a process which maintains all LEC and ILEC protections afforded under the Telecommunications Act of 1996 (the Federal Act)

On July 25, 1996, the Department of Public Service (the Department) filed a petition for reconsideration of the July 15, 1996 Order.

On the same date, the Minnesota Independent Coalition (MIC) filed a petition for reconsideration and clarification of the Order.

On August 5, 1996, the Residential Utilities Division of the Office of Attorney General (RUD-OAG) filed a petition for reconsideration.

On August 5, 1996, AT&T and US WEST Communications, Inc. (US WEST) filed responses to the Department's and MIC's petitions for reconsideration.

On August 15, 1996, AT&T filed a response to the RUD-OAG's petition for reconsideration and to US WEST's responsive comments.

On November 12, 1996, the matter came before the Commission for consideration.

FINDINGS AND CONCLUSIONS

I. THE PETITIONS FOR RECONSIDERATION

A. The Department's Petition

1. Issues Raised

In its petition for reconsideration, the Department raised four issues regarding the July 15 Order:

- the Order's requirement for AT&T to include a list of territories it intends to serve
- the provision granting AT&T a certificate of authority to serve the entire state without requiring that it actually provide service to the entire state
- the relation of Minn. Stat. § 237.16, subd. 4 (the certificate amendment process) to the conditional certification process ordered for AT&T
- the relation of Minn. Stat. § 237.16, subd. 11 (mandating a contested case or expedited proceeding prior to granting authority to serve in the territories of small local exchange companies) to the conditional certification process ordered for AT&T

2. Responses

US WEST agreed with the Department regarding the need for service area maps rather than lists of municipalities to be served. US WEST expressed interest in the Department's questions regarding the application of the state certification process to the conditional certificate granted to AT&T.

AT&T stated that the Department's petition for reconsideration should be rejected because it raised no new issues of law or fact. The Commission is free to correct mistakes of fact or law on reconsideration, but in this case there were no such mistakes.

AT&T argued that Minn. Stat. § 237.16, subds. 4 and 5 apply only to incumbent local exchange

companies (LECs), not to new entrants such as AT&T. Any other interpretation would require AT&T to come back to the Commission for approximately 90 separate hearings as it actually contemplated service to individual small LEC territories. Such a cumbersome process would constitute a barrier to entry contrary to the intent of state and federal law.

AT&T would agree to a Commission hearing before beginning to serve in any small LEC territory, but not to a duplication of hearings for each territory--one hearing under Minn. Stat. § 237.16, subd. 11 in the certification stage, and one under the Federal Act in the arbitration stage. The two hearings could be combined under the federal arbitration/interconnection process, removing an anti-competitive barrier to entry.

B. MIC's Petition

1. Issues Raised

MIC stated that both the Federal Act and Minn. Stat. § 237.16 recognize that unique issues are presented when companies propose local competition in the areas of small LECs (that is, those with fewer than 50,000 access lines). MIC argued that it is essential that the service obligations of the small LECs and AT&T, including the Eligible Telecommunications Carrier (ETC) service issues under the Federal Act, be resolved before the parties' negotiation/arbitration process begins. For these reasons, AT&T's proposal to combine the certification hearing under Minn. Stat. § 237.16, subd. 11 with the arbitration hearing under federal law would significantly lessen the protections meant to be afforded to small LECs.

MIC stated that the Order is unclear that the requirement of a contested case or expedited hearing under Minn. Stat. § 237.16, subds. 4 and 11 is deferred, but not eliminated, and will occur before AT&T is allowed to provide service in small LEC areas. MIC asked for clarification of this point.

2. Responses

US WEST disagreed with MIC's interpretation of the Federal Act's ETC obligations on large LECs.

AT&T argued that reconsideration is not necessary because the Commission's Order dealt adequately with the issues of small LEC protections under the Federal Act.

AT&T also argued that neither state nor federal law supports MIC's demand for an initial hearing under Minn. Stat. § 237.16, subd. 11 prior to the negotiation of any interconnection agreement. On the contrary, the Federal Act plainly contemplates that any facilitation of the negotiation and arbitration processes will occur in conjunction with the Act's exemption/suspension/modification proceedings for rural LECs. The latter process is consistent with the pro-competitive structure of the state and federal laws.

Finally, AT&T argued that MIC is not entitled to the immediate contested case or expedited proceeding that MIC had suggested as an alternative to the initial hearing approach. MIC has

not provided any legal support for its argument that AT&T must provide further explanation of its service plans.

C. The RUD-OAG's Petition

1. Issues Raised

According to the RUD-OAG, Minn. Stat. § 237.16, subds. 5 and 6 provide that a certificate should convey both a right and a corresponding obligation to serve all areas included in the certificate. AT&T's statewide certificate runs counter to this statutory provision, because AT&T does not have the ability or intent to serve the entire state.

The RUD-OAG argued that AT&T's statewide certification renders meaningless Minn. Stat. § 237.16, subd. 4, which requires notice and the opportunity for an expedited proceeding for a proposed territorial expansion. The RUD-OAG disagreed with AT&T's statement that the Subd. 4 amendment/expansion process constitutes a barrier to entry. The Federal Act preserved the state's right to protect its consumers and did not sweepingly preempt state laws on the pretext of removing barriers to entry. The RUD-OAG also disagreed with AT&T's statement that Minn. Stat. § 237.16, subd. 4 and 5 apply only to incumbents. If the legislature had intended to so limit the scope of these subdivisions, it would have done so.

The RUD-OAG stated that Minn. Stat. § 237.16, subd. 11 provides special protections for small LECs who are faced with local competition. The law entitles small LECs to a contested case or an expedited hearing when a new company requests certification to provide local service in the small LEC's territory. The RUD-OAG asked the Commission to clarify that it does not intend to deny small LECs the subd. 11 hearing, but rather intends to defer the hearing to the time when AT&T actually requests interconnection with the small LEC.

2. Responses

AT&T stated that the record is clear that AT&T intends to eventually provide local telephone service throughout the State of Minnesota.

AT&T stated that it will comply with statutory and rule requirements regarding the filing of service area maps as it negotiates interconnection agreements with various small LECs. Because this matter does not need to be addressed in the certificate itself, the Commission need not reconsider or clarify this issue.

AT&T argued that the Commission can adequately consider the unique rights of small LECs in conjunction with the interconnection process contemplated under the Federal Act.

II. COMMISSION ACTION

The issues raised by the parties requesting reconsideration fall under four major headings:

- 1) the standard for Commission reconsideration; 2) the requirement to file service area maps;
- 3) the extent of AT&T's authority to provide local service; and 4) the Commission's application

of Minn. Stat. § 237.16, subd. 11 to ensure necessary protections for small LECs facing competition.

A. The Standard for Commission Reconsideration

AT&T cites In Re Minnesota Public Utilities Commission's Initiation of Summary Investigation, 417 N.W. 2d 274, 283 (Minn. Ct. App. 1987) for the proposition that the Commission should deny reconsideration if the petitioner fails to raise new arguments not previously considered. The Commission disagrees with AT&T's interpretation of this decision. The Court of Appeals merely found meritless the appellant's claim that the Commission had failed to address new arguments raised in appellant's petition for reconsideration. Elsewhere in this decision, the Court of Appeals actually stressed an administrative agency's inherent right to reconsider past decisions:

[A]n administrative agency has a well-established right to reopen, rehear, and redetermine the matter even after a determination has been made. This is a rule of general application.

In Re Minnesota Public Utilities Commission at p. 282.

The Commission's right to reconsider its previous decisions or Orders is found at Minn. Rules, part 7829.3000, subp. 6:

Commission Action. The commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition.

The rule granting the Commission the authority to reconsider does not qualify that authority or limit it to newly introduced issues of law or fact. In its redeliberation, the Commission is free to apply its discretion and expertise to the entire record of the proceeding. The Commission may gain fresh insights from the parties' written briefs and oral arguments upon reconsideration. If the Commission finds that it has come to a conclusion which differs from the original opinion, the Commission may, and must, modify its prior decision to conform to the conclusion it believes is in the public interest.

In this instance, the Commission has carefully considered the oral and written comments of the parties upon reconsideration, as well as the record of the entire proceedings. Upon reconsideration, the Commission has concluded that its July 15, 1996 Order must be modified and clarified in some respects. In the remainder of this Order, the Commission will discuss its decision to reconsider and clarify portions of the July 15 Order.

B. The Requirement to File Service Area Maps

1. Introduction

In the July 15, 1996 Order, the Commission required AT&T to include in its tariff a list of all areas (by municipality) where AT&T actually provides service, with that list to be updated as AT&T expands its service territory.

The Department and the RUD-OAG asked the Commission to reconsider or clarify this portion of the Order to ensure that AT&T files service area maps as required under statute and rules.

2. Commission Action

The requirement for local providers to file service area maps is found in Minnesota statute and rule.

Minn. Stat. § 237.16, subd. 3 provides: “Every company authorized to provide local telephone service under this section shall file a territorial map. The map must comply with the rules prescribed by the commission.”

Minn. Rules, part 7810.0500, subp. 2 provides in part:

Each telephone utility shall have on file with the commission an exchange area boundary map for each of its exchanges within the state. Each map shall clearly show *the boundary lines of the area which the telephone utility holds itself out to serve in connection with the exchange.* (Emphasis added.)

In its reconsideration filings, AT&T acknowledged its obligation to file detailed service area maps. At page eight of its August 5, 1996 response, the Company stated: “AT&T intends to provide maps showing the boundaries of the exchanges in which it is providing service, consistent with applicable law and rules. At page three of its August 15 filing, AT&T further stated: “There is no apparent reason why AT&T cannot file all required maps as it negotiates interconnection agreements with the incumbent LECs who presently control the local exchanges.”

AT&T’s obligation to file detailed service area maps is established in statute and rule. AT&T has acknowledged its obligation and intent to file the maps pursuant to statute and rule. The Commission will therefore clarify the portion of its July 15, 1996 Order which required AT&T to include in its tariff an updated list of municipalities it serves. The Commission will clarify that this Order provision was not meant to supersede the statutory and rule provisions obliging AT&T to file detailed service area maps.

The Commission will require AT&T to file a map or maps showing exactly where the Company is providing service, consistent with the Commission’s rules. The Company may reference the Commission’s official maps and specific exchanges, if the Company is serving the entire exchange. Since an area to be served may not coincide with telephone exchange boundary lines, when the Company is serving less than an entire exchange it must provide a map indicating its exact service area.

C. The Extent of AT&T’s Authority to Provide Local Service

1. Introduction and Summary of Commission Action

In the July 15, 1996 Order, the Commission granted AT&T a certificate of authority to provide local service in the State of Minnesota.

Upon reconsideration, with the benefit of parties' briefs and oral arguments, plus certain new facts brought to light, the Commission finds that it must modify the statewide scope of the certificate it previously granted to AT&T.

Minnesota has an orderly and comprehensive procedure for granting certification for local exchange service. A close reading shows that these statutory procedures can only provide their intended benefits and protections if the product of the certification process is a particularized certificate. A statewide certificate does not fulfill the legislative purpose of ensuring reliable, high quality local telephone service to particular areas under terms and conditions the Commission finds consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with Commission rules, and the Commission's rules.

The Commission will discuss in detail the major subsections that form the statutory certification process, and the need for compliance with these subsections to develop a particularized certificate of authority which ensures competitive benefits and protections.

2. The Certification Process Contemplated by Minn. Stat. § 237.16

Minn. Stat. § 237.16, subd. 1 New Service, Certificate of Authority. This subsection lays the basic framework for the state certification process. The statute gives the Commission the exclusive authority to authorize the provision of local service in the state, and to prescribe the terms and conditions under which service will be provided. The statute requires prospective entrants to demonstrate sufficient technical, managerial, and financial resources to provide service. The petitioner must also show that the terms and conditions of service will be consistent with the public interest--specifically, that service will be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with Commission rules, and the Commission's rules.

This subsection indicates that the legislature intended the Commission to make findings regarding specific service to a particular set of ratepayers, in order to determine if the public interest would be served by the competitive entry.

Minn. Stat. § 237.16, subd. 3 Maps. As discussed previously in this Order, this subsection, which must be read together with relevant Commission rules, requires each local service provider to provide maps which clearly show the extent of the area the company holds itself out to serve.

This statutory subsection indicates a legislative intent to provide clear, understandable information regarding the boundaries of the specific local service offering. This legislative goal runs counter to the concept of statewide certification, under which a new entrant would

presumably simply notify the public and regulatory agencies of a general intent to serve the entire state.

As an integral part of the state certification process, Minn. Stat. § 237.16, subd. 3 is a necessary protection for ratepayers seeking clear information regarding the scope of local service.

Minn. Stat. § 237.16, subd. 4 Amended Certificate Required for Expansion. With this subsection, the legislature provided a procedure for expanding local service. Under the procedure, the Commission focuses on the exact projected expansion (with the benefit of new maps provided by the petitioner), requires notice to affected municipalities and local telephone companies, and allows an expedited proceeding if objections are raised regarding the proposed expansion.

The amendment/expansion procedure indicates that the legislature intended the Commission to determine if the prospective entrant has the requisite intent and ability to serve in the expanded territory. This goal is contrary to the concept of statewide certification, under which expansion would simply take place as the company's technology or overall planning indicated, without the filing of new maps, notice to the community or other telephone companies, or the possibility of an expedited proceeding.

The Commission disagrees with AT&T's premise that the Federal Act and a statewide certificate render unnecessary the statutory amendment process for expansion. The Commission does not agree with AT&T's arguments that the certificate amendment subdivision is limited to incumbents, preempted by the Federal Act, a barrier to entry, or an anticompetitive hardship for AT&T.

Minn. Stat. § 237.16, subd. 4 is not limited in its application to incumbent service providers. The subdivision provides two exceptions to its provisions. First, a telephone company currently operating an exchange need not secure a certificate to expand or to substitute facilities in a territory within which the company has previously filed maps. Second, a telephone company currently operating an exchange need not secure a certificate to expand into a contiguous, unserved territory if no certificate for the expansion territory has been issued to or applied for by another company. These limited, specific exceptions indicate that the subdivision otherwise applies to any local telephone provider, either an incumbent or a prospective entrant, that wishes to extend its service into some specific part of Minnesota service territory. Neither logic nor statutory language indicates that new entrants are exempt from the statutory requirements for service expansion.

Minn. Stat. § 237.16, subd. 4 is not preempted by the Federal Act. The process of obtaining certification for state service expansion is not contrary to any specific provision of the Act. Neither does the subdivision hinder the arbitration/interconnection process contemplated by the Federal Act. As a necessary part of our state certification process, the amendment process is consistent with the Act and allowed under it.

Minn. Stat. § 237.16, subd. 4 does not constitute a barrier to entry under the Federal Act. While the Act forbids state commissions from raising legal requirements which will prohibit or inhibit

competitive entry, the Act further provides at § 253 (b):

(b) STATE REGULATORY AUTHORITY. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

As an integral part of the state certification process, Minn. Stat. § 237.16, subd. 4 is a necessary protection for consumers and is thus not a barrier to entry under the Federal Act. Neither can AT&T demonstrate practically that the statutory subdivision is a barrier to entry. The specter of 90 separate amendment proceedings as the Company gradually expands seems highly unlikely. Consolidated proceedings as the Company forecasts expansion are a more likely scenario.

Finally, Minn. Stat. § 237.16, subd. 4 does not constitute an anticompetitive hardship for AT&T. At the November 12 meeting, AT&T for the first time indicated that it does not contemplate actual statewide service for four to five years. A nonspecific number of expedited proceedings, many of which could probably be combined, and none of which should take more than 120 to 180 days, does not seem a hardship in an expansion plan of four to five years. The Commission also notes that AT&T would be free to begin the negotiation process with any of the small LECs during this time, even before AT&T's certification was amended to include the LEC territory.

As an essential part of the state certification process, Minn. Stat. § 237.16, subd. 4 allows the Commission to protect consumers, municipalities, and other telephone companies by granting service expansion to providers who have demonstrated the requisite intent and ability to provide service.

Minn. Stat. § 237.16, subd. 5 Revocation. With this subsection, the legislature provided a system by which the Commission may, after notice and hearing, revoke a certificate in whole or part. A certificate may be revoked for: the failure of its holder to furnish reasonably adequate telephone service within the area determined by the certificate; the failure of the holder to meet the terms and conditions of its certificate; or a holder's intentional violation of the Commission's rules or Orders.

The revocation procedure indicates that the legislature intended the Commission to be able to monitor and control the provision of local service under state certification. This goal is contrary to the concept of statewide certification, under which a provider could be certified throughout the state, without the ability to provide service, let alone adequate service, in most LEC territories.

In its petition for reconsideration, AT&T argued that the Federal Act and AT&T's statewide certification render the application of Minn. Stat. § 237.16, subd. 5 irrelevant to its state service. In defense of this argument, AT&T raised the same issues it had raised regarding Minn. Stat. § 237.16, subd. 4: the subsection is federally preempted; constitutes a barrier to entry; brings competitive hardship to a prospective entrant; and applies only to incumbent LECs. For the reasons stated in the preceding section of this Order, the Commission rejects these arguments. Minn. Stat. § 237.16, subd. 5, an integral part of the legislature's certification procedure, must remain in effect as an important check on a provider's ongoing or new provision of service.

Minn. Stat. § 237.16, subd. 11. Interim Authority in Areas Served by Telephone Companies with Less than 50,000 Subscribers. With this subsection, the legislature provided a process for the Commission to address the special issues raised by the advent of competition in small LECs' territories. This subsection, too, is an essential part of our state's orderly certification process. It cannot be bypassed or minimized without risking the protections meant to be provided small ILECs by the certification process.

The Commission will further address the special protections of Minn. Stat. § 237.16, subd. 11 in the next section of this Order.

3. Conclusion

Upon careful review of the parties' filings and arguments, the Commission finds that it must reconsider the scope of the certification it previously granted to AT&T. A statewide local certificate runs contrary to the goals the legislature carefully addressed in the state certification procedure. AT&T's compliance with state procedure through a particularized certification process is necessary to ensure the benefits and protections previously discussed in this Order: certification of a particular service to a particular set of ratepayers in conjunction with a public interest determination; clarification through maps of the extent of territory to be served; notice to consumers, municipalities, and other telephone companies that the certified entrant has the requisite intent and ability to serve; Commission monitoring of the adequacy of service; and a system of special protections for small LECs facing competition.

The Commission will limit the scope of AT&T's certificate of authority to the areas AT&T has demonstrated an ability and intent to serve, as indicated by the commencement of interconnection negotiations: territories currently served by US WEST Communications, Inc., GTE Minnesota, and United Telephone Company of Minnesota.

III. THE COMMISSION'S APPLICATION OF MINN. STAT. § 237.16, SUBD. 11 TO ENSURE NECESSARY PROTECTIONS FOR SMALL LECs

A. Introduction and Summary of Commission Action

At page seven of the July 15, 1996 Order, the Commission states:

The state certification process and the protections of the Federal Act will be considered together by the Commission when it addresses a new entrant's negotiation with an ILEC. When AT&T requests interconnection with a particular ILEC, the Commission will determine if AT&T should be allowed to provide local service in that territory under the provisions of both the state statutes and the Federal Act.

MIC, the Department, and the RUD-OAG asked the Commission to clarify that the Order allowed deferral of the subd. 11 protections for small LECs until AT&T actually requests interconnection, but did not eliminate the protections altogether. The Commission will so clarify its Order.

B. Commission Clarification

Minn. Stat. § 237.16, subd. 11 provides a separate procedure for Commission determination of a new entrant's application to provide local service in a territory served by a telephone company with fewer than 50,000 subscribers. In contrast to a nonspecific "determination" on an application for certification in a large LEC's territory under Minn. Stat. § 237.16, subd. 1, a contested hearing or expedited proceeding is required under this subsection to address the special issues facing small LECs. The statute specifically requires the Commission to consider "facts unique" to the small LEC facing competition. Minn. Stat. § 237.16, subd. 11 is also interim in nature, pending a separate rulemaking addressing the issues of small LECs (as required under Minn. Stat. § 237.16, subd. 8).

The separate procedures under Minn. Stat. § 237.16, subd. 11 indicate a legislative intent to provide special protections at the certification stage for small LECs facing local competition. While the procedures required certainly could, and usually should, be deferred until a new entrant has actually planned to expand into a small LEC's territory, the procedures cannot be eliminated, minimized, or superseded by the federal interconnection/arbitration process. Important issues unique to small LECs must be addressed outside the arbitration/interconnection proceeding. The service obligations of the potential competitor, possible designation of the entrant as an Eligible Telecommunications Carrier under the Act, fair and reasonable rates, and other special competitive issues for small telephone companies facing competition from major carriers must be resolved before the parties can enter into productive interconnection negotiations under the Federal Act.

Minn. Stat. § 237.16, subd. 11 is an essential part of the state certification process, consistent and complementary with the provisions of the Federal Act. Maintenance of the state protections at the certification stage will not constitute a barrier to entry or an unreasonable competitive hardship for the new entrant. The alternative raised by AT&T--subsuming the Subd. 11 process into the sweeping federal arbitration/interconnection process--would mean that the special issues of small LECs facing competition would be given short shrift. This is not consistent with the process of reasonable protections contemplated by the state legislature.

The Commission will clarify that small LECs facing local competition are entitled to a proceeding under Minn. Stat. § 237.16, subd. 11 until local competition rules for small LECs are developed. AT&T may defer the Subd. 11 proceeding until the Company contemplates interconnection with each particular small LEC, but may not eliminate the state proceeding.

ORDER

1. The Commission reconsiders its July 15, 1996 Order to limit AT&T's certificate of authority to those areas AT&T currently intends to serve, as evidenced by the commencement of interconnection negotiations: territories currently served by US WEST Communications, Inc., GTE Minnesota, and United Telephone Company of Minnesota.
2. The Commission clarifies its July 15, 1996 Order by stating that AT&T must file detailed service area maps showing exactly where the Company is providing service, consistent with the Commission's rules and the provisions of this Order.

3. The Commission clarifies that small LECs facing local competition are entitled to a proceeding under Minn. Stat. § 237.16, subd. 11 until local competition rules for small LECs are developed. AT&T may defer the Subd. 11 proceeding until the Company contemplates interconnection with each particular small LEC, but may not eliminate the state proceeding.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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